

RECEIVED  
FEDERAL ELECTION  
COMMISSION

**FEDERAL ELECTION COMMISSION**  
**999 E Street N.W.**  
**Washington, D.C. 20463**

2013 MAY 22 PM 3:41

**FIRST GENERAL COUNSEL'S REPORT**

**CELA**

MUR 6673

COMPLAINT RECEIVED: 10/22/2012

NOTIFICATION DATE: 11/01/2012

RESPONSE RECEIVED: 11/21/2012

DATE ACTIVATED: 01/22/2013

EXPIRATION OF SOL: (earliest) 10/01/2017  
(latest) 10/20/2017

**COMPLAINANT:**

Wendolyn Aragon

**RESPONDENT:**

David Lee for Supervisor 2012

**RELEVANT STATUTES  
AND REGULATIONS:**

2 U.S.C. § 431(8)(B)(ix), (x)

2 U.S.C. § 431(9)(B)(viii)

2 U.S.C. § 441d

2 U.S.C. § 441h

2 U.S.C. § 441i(f)

11 C.F.R. §§ 100.88, 100.148

11 C.F.R. § 300.71

**INTERNAL REPORTS CHECKED:**

FEC Database

**FEDERAL AGENCIES CHECKED:**

None

**I. INTRODUCTION**

This matter concerns allegations that the non-federal campaign of David Lee, a 2012 candidate for San Francisco's Board of Supervisors, violated the Federal Election Campaign Act of 1971, as amended (the "Act"), in connection with the distribution of an unknown number of door-hanger brochures advocating the election of various Democratic Party federal and non-federal candidates. The Complaint alleges that David Lee for Supervisor 2012 ("Lee Committee") (1) used a color scheme and slogan that would deceive voters into believing that the door hanger was official Democratic National Committee ("DNC") or Obama for America

13044343072

1 ("Obama Committee") campaign material; (2) used non-federal funds to pay for campaign  
2 material that advocated the election of federal candidates; and (3) failed to include a disclaimer  
3 stating that the door hanger was not official DNC or Obama Committee campaign materials or  
4 that the candidates featured on the door hanger did not necessarily endorse the other candidates  
5 appearing on the material.<sup>1</sup>

6 We recommend that the Commission find no reason to believe that the Lee Committee  
7 violated 2 U.S.C. § 441h by fraudulently misrepresenting itself. Further, based on our  
8 conclusion that the door hanger is not a "public communication," we also recommend that the  
9 Commission find no reason to believe that the Lee Committee violated 2 U.S.C. §§ 441i(f) or  
10 441d.

## 11 II. FACTS

12 David Lee was an unsuccessful 2012 candidate for District 1 of the San Francisco Board  
13 of Supervisors. His campaign committee was David Lee for Supervisor 2012, which filed  
14 disclosure reports with the San Francisco Ethics Commission.<sup>2</sup>

15 The Lee Committee prepared and distributed a two-sided door hanger that is  
16 approximately 17 inches long and five-and-a-half inches wide with an open circle at the top to  
17 hang on a door knob. See Compl., Attach. (Oct. 22, 2012). The last lines of the back side of the  
18 door hanger read: "Paid For By David Lee for Supervisor 2012." *Id.*

<sup>1</sup> The Complaint also alleges that the door hanger failed to include a California Fair Political Practices Commission identification number as required by state law. Compl. at 1 (Oct. 22, 2012). We make no recommendation regarding this allegation since the issue is outside of the Commission's jurisdiction.

<sup>2</sup> See S.F. Ethics Commission Campaign Finance and Filing Data at <http://www.sfethics.org/ethics/2012/05/campaign-finance-filings-and-data.html>.

1 The front of the door hanger contains the word "FORWARD" in large white capital  
2 letters with a blue background color scheme. *Id.* Small white text surrounding the circle part of  
3 the door hanger states: "Delivered by a San Francisco Firefighter." *Id.*

4 The back side of the door hanger at the top reads in blue and red letters, "SAN  
5 FRANCISCO FIREFIGHTERS URGE YOU TO VOTE FOR.;" and features a circular seal that  
6 reads "IAFF San Francisco Firefighters Local 798." Compl., Attach. The back of the door  
7 hanger advocates the election of four candidates (two federal, one state, and one local) and  
8 presents a position on five state- and local-ballot propositions. *Id.* The four candidate  
9 endorsements appear in the top three quarters of the door hanger. The space is allocated equally  
10 between endorsements for Barack Obama for President, Dianne Feinstein for Senate, Phil Ting  
11 for Assembly, and David Lee for the Board of Supervisors. *Id.* The five ballot proposition  
12 endorsements occupy the bottom quarter of the door hanger. *Id.*

13 A disclosure report that the Lee Committee filed with the San Francisco Ethics  
14 Commission indicates that the only cost associated with the door hanger is a \$1,500 payment  
15 made to the "San Francisco Firefighters Slate Card (#1342688) during the period of October 1 –  
16 October 20, 2012."<sup>3</sup> The disclosure report does not indicate how many door hangers were  
17 distributed or when they were distributed.

18 The Response argues that the Lee Committee did not mislead voters since the door  
19 hanger clearly states, "Paid For By David Lee for Supervisor 2012." *See generally* Resp. at 1  
20 (Nov. 21, 2012). Further, Respondent contends that Complainant cites to no provision of the Act  
21 that requires a committee to include a disclaimer stating that its door hanger is not authorized by  
22 a Presidential campaign or that no candidate on the door hanger endorses any other candidates.

<sup>3</sup> See S.F. Ethics Commission Campaign Finance and Filing Data at  
<http://www.fethics.org/ethics/2012/05/campaign-finance-filings-and-data.html>.

13044343074

1 listed on the door hanger. *Id.* Respondent also argues that the Commission has not determined  
2 that a door hanger constitutes a "public communication" that would require a disclaimer. *Id.* at 2  
3 n.1. Finally, the Response claims that the Lee Committee used federal funds to pay for the door  
4 hanger, and that this payment did not constitute an "expenditure" under the Act since the door  
5 hanger qualifies for the "coattails exemption" of 11 C.F.R. § 100.148. Resp. at 2.

6 **III. LEGAL ANALYSIS**

7 **A. Alleged Misrepresentation of Campaign Authority**

8 Complainant alleges that the Lee Committee used the color scheme and slogan of the  
9 Obama Committee in an effort to mislead voters as to the source of the door hanger. The  
10 Complaint does not cite a provision of the Act but could be read to suggest a violation of  
11 2 U.S.C. § 441h(a)(1). That provision provides that no federal candidate, employee, or agent of  
12 such candidate shall "fraudulently misrepresent himself or any committee or organization under  
13 his control as speaking or writing or otherwise acting for or on behalf of any other candidate . . .  
14 on a matter which is damaging to such other candidate." *Id.*

15 The Lee Committee did not violate section 441h(a)(1). Lee was not a federal candidate,  
16 or the agent or employee of a federal candidate. Furthermore, Lee and his Committee did not  
17 represent on the door hanger that they were acting on behalf of President Obama or Senator  
18 Feinstein — the door hanger identifies the Lee Committee as the party responsible for the door  
19 hanger. Finally, the door hanger is not in any way potentially damaging to President Obama or  
20 Senator Feinstein; to the contrary, the hanger urges the reader to vote for Obama and Feinstein.  
21 Accordingly, we recommend that that Commission find no reason to believe that the Lee  
22 Committee violated 2 U.S.C. § 441h(a)(1).

23

13044343075

**B. Alleged Use of Non-federal Funds**

The Complaint alleges that the Lee Committee spent non-federal funds<sup>4</sup> for a communication that expressly advocates for the election of federal candidates in violation of 2 U.S.C. § 441i(f). *See also* 11 C.F.R. § 300.71. Under section 441i(f), state and local candidates may spend only funds that “are subject to the limitations, prohibitions, and reporting requirements” of the Act on a “public communication” that refers to a clearly identified candidate for federal office and that promotes, attacks, supports, or opposes any candidate for that office. *See also* 2 U.S.C. § 431(20)(A)(iii). A “public communication” is “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” 2 U.S.C. § 431(22).

The Lee Committee did not violate section 441i(f) because its door hanger is not a “public communication.” Instead, the door hanger qualifies as a type of “handbill” that the Act distinguishes from such public communications. By definition, a “handbill” is “a small printed sheet to be distributed (as for advertising) by hand.” *See Merriam Webster's Dictionary*, at <http://www.merriam-webster.com/dictionary/handbill>.

The Commission has determined that a handbill is not a “public communication” under section 431(22) if, at the least, the handbill meets the requirements of the so-called “coattails exemption” of 2 U.S.C. §§ 431(8)(B)(ix)-(x), 431(9)(B)(viii).<sup>5</sup> *See also* 11 C.F.R. §§ 100.88,

<sup>4</sup> The Commission's regulations define non-federal funds as “funds that are not subject to the limitations and prohibitions of the Act.” 11 C.F.R. § 300.2(k).

<sup>5</sup> *See* Certification, MUR 5604 (Mason); Statement of Reasons, Comm'rs Toner, Mason, and von Spakovsky at 3, 5-6, MUR 5604 (Mason); Statement of Reasons, Comm'rs Lenhard, Walther, and Weintraub at 2, 4-5, MUR 5604 (Mason). Three Commissioners concluded that *all* handbills fall outside of the definition of “public communication” (and thus those that qualify for the coattails exemption necessarily fall outside of the definition), while three Commissioners more narrowly concluded that only those public communications that qualify for the

13044343076

1 100.148. The coattails exemption provides an exception to the Act's definitions of  
2 "contribution" and "expenditure" for certain campaign materials used in connection with  
3 volunteer activities — including "handbills" — so long as the cost of the material allocable to  
4 federal candidates was paid for with contributions subject to the "limitations and prohibitions" of  
5 the Act. 11 C.F.R. §§ 100.88, 100.148. Such "handbills" are explicitly distinguished from  
6 "broadcasting, newspapers, magazines, billboards, direct mail or similar types of general public  
7 communication or political advertising," *id.* — a class of communications that is nearly identical  
8 to the definition of "public communication" under 2 U.S.C. § 431(22). Accordingly, a handbill  
9 that qualifies for the coattails exemption is not a public communication.

10 Here, the door hanger qualifies for the coattails exemption. It was hand delivered to  
11 potential voters by volunteers from the San Francisco Fire Department. *See* Compl., Attach. Its  
12 entire cost, including the portion allocable to federal candidates, was paid for by the Lee  
13 Committee with funds subject to the limitations and prohibitions of the Act.<sup>6</sup> The Lee  
14 Committee reported paying \$1,500 for the door hanger on its disclosure report covering the time  
15 period of October 1 to October 20, 2012. *See* [http://www.sfethics.org/ethics/2012/05/campaign-](http://www.sfethics.org/ethics/2012/05/campaign-finance-filings-and-data.html)  
16 [finance-filings-and-data.html](http://www.sfethics.org/ethics/2012/05/campaign-finance-filings-and-data.html). That report also disclosed a cash-on-hand balance of \$26,891.99.  
17 *Id.* The available information indicates that the Lee Committee received no contributions that  
18 exceeded \$500, and no corporate or foreign national contributions. *Id.* In fact, the San Francisco  
19 Campaign and Governmental Conduct Code imposed a limit of \$500 on contributions to the Lee

---

coattails exemption are not "public communications." Compare SOR, Comm'rs Toner, Mason, and von Spakovsky at 4-5, with SOR, Comm'rs Lenhard, Walther, and Weintraub at 3-4.

<sup>6</sup> Even though the Lee Committee paid for the door hanger with funds subject to the limitations and prohibitions of the Act (thus qualifying for the coattails exemption), those funds were not federal funds under 2 U.S.C. § 441i(f) or 11 C.F.R. 300.2(g) since they were not also subject to the *reporting requirements* of the Act. The spending at issue was not reported since the Lee Committee is not a federal political committee under 2 U.S.C. § 431.

13044343077

1 Committee, which is well below the then-applicable federal individual contribution limit of  
2 \$2,500.<sup>7</sup> See S.F. Camp. & Gov't. Conduct Code § 1.114(a) (2012). Further, San Francisco  
3 Campaign and Governmental Conduct Code barred the Lee Committee from accepting  
4 contributions from corporations and foreign entities. *Id.* § 1.114(b) (2012).

5 Because the door hanger qualifies as a handbill under the coattails exemption, it is not a  
6 "public communication" subject to the prohibition at 2 U.S.C. § 441i(f).<sup>8</sup> We therefore  
7 recommend that the Commission find no reason to believe that Lee Committee violated 2 U.S.C.  
8 § 441i(f)(1) and 11 C.F.R. § 300.71.

9 **C. Alleged Failure to Include a Proper Disclaimer**

10 The Complaint alleges that the Lee Committee failed to affix a disclaimer to the door  
11 hanger stating that the hanger was not official DNC or Obama Committee material, or a  
12 disclaimer stating that no candidate featured endorsed the other candidates featured. Compl. at  
13 1. The Response states that the Commission does not require such a disclaimer, and that the  
14 Commission has not decided that a door hanger constitutes a "public communication" requiring  
15 any type of disclaimer. Resp. at 2.

16 Generally, 2 U.S.C. § 441d requires certain communications to carry a disclaimer  
17 identifying who paid for the communication. More specifically, Commission regulations

---

<sup>7</sup> At the relevant time, 2 U.S.C. § 441a(a)(1)(A)'s limit was \$2,500. The limit has since been adjusted upwards for inflation to \$2,600. See *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 Fed. Reg. 8530-02, 8532 (Feb. 6, 2013).

<sup>8</sup> The Complaint did not allege that the Lee Committee was required to register and report as a political committee pursuant to 2 U.S.C. § 432, or that any of the disbursements made in connection with the door hanger were contributions to the mentioned federal candidates. Nonetheless, we conclude that the Lee Committee did not trigger the political committee threshold, or make contributions to the mentioned federal candidates by making contributions or expenditures aggregating in excess of \$1,000 per calendar year since the payment for the door hanger fits within the requirements of the "coattails exemption," and therefore does not constitute a "contribution" or "expenditure" for purposes of determining the federal political committee monetary threshold. See SOR, Comm'rs Teper, Mason, and von Spakovsky at 3, 7, MUR 5604 and SOR, Comm'rs Lenhard, Wulthier, and Weintraub at 2, MUR 5604. Therefore, there is no need to address the issue of whether the "major purpose" test is satisfied.

1 provide that all "public communications," as defined by 11 C.F.R. § 100.26, that expressly  
2 advocate the election or defeat of a clearly identified federal candidate must include a disclaimer.  
3 11 C.F.R. § 110.11(a)(2). Here, as discussed above, the door hanger is not a "public  
4 communication" because it qualifies for the coattails exemption. *Supra* Part III.B. Thus, the  
5 door hanger did not require a disclaimer pursuant to 2 U.S.C. § 441d,<sup>9</sup> and accordingly, we  
6 recommend that the Commission find no reason to believe that the Lee Committee violated  
7 2 U.S.C. § 441d.

8 **IV. RECOMMENDATIONS**

- 9 1. Find no reason to believe that David Lee for Supervisor 2012 violated 2 U.S.C.  
10 § 441h(a)(1).  
11  
12 2. Find no reason to believe that David Lee for Supervisor violated 2 U.S.C.  
13 § 441i(f)(1).  
14  
15 3. Find no reason to believe that David Lee for Supervisor violated 2 U.S.C. § 441d.  
16  
17 4. Approve the Factual and Legal Analysis.  
18  
19 5. Approve the appropriate letters.  
20  
21 6. Close the file.  
22  
23  
24  
25  
26  
27  
28  
29  
30

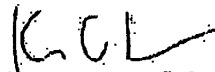
Anthony Herman  
General Counsel

Daniel Petalas  
Associate General Counsel  
for Enforcement

31  
32  
33 Date

5-22-13

BY:

  
Kathleen Guith  
Deputy Associate General Counsel  
for Enforcement

<sup>9</sup> In making this recommendation, we point out that the Lee Committee did affix language to the door hanger clearly indicating that it was responsible for the door hanger.

13044343079



MUR 6673 (Lee)  
First General Counsel's Report

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15



Mark Shonkwiler  
Assistant General Counsel



Kimberly D. Hart  
Staff Attorney

13044343080